United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

148/12

TRANSCRIPT OF RECORD.

Court of Appeals of the District of Columbia.

APRIL TERM, 1922.

No. 3856. 938

JOSEPH W. BAILEY, PLAINTIFF IN ERROR,

vs.

ALLAN E. WALKER AND COMPANY, INC., A CORPORATION.

IN ERROR TO THE MUNICIPAL COURT OF THE DISTRICT OF COLUMBIA.

FILED AUGUST 8, 1922.

PRINTED AUGUST 24, 1922.

Feb. 12,

S(C.J.) B. R.

Court of Appeals of the District of Columbia.

APRIL TERM, 1922.

No. 3856.

JOSEPH W. BAILEY, PLAINTIFF IN ERROR,

vs.

ALLAN E. WALKER AND COMPANY, INC., A CORPORATION, DEFENDANT IN ERROR.

IN ERROR TO THE MUNICIPAL COURT OF THE DISTRICT OF COLUMBIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 22, 1922.

Court of Appeals of the District of Columbia.

No. 3856.

JOSEPH W. BAILEY, Plaintiff in Error,

vs.

ALLAN E. WALKER AND COMPANY, INC., a Corporation.

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1 Municipal Court of the District of Columbia.

No. 210,748.

ALLAN E. WALKER AND COMPANY, INC., a Corporation, Plaintiff,

vs.

JOSEPH W. BAILEY, Defendant.

Landlord & Tenant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Municipal Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above entitled cause, to wit:

2 *Complaint.*

Filed December 20, 1921.

In the Municipal Court of the District of Columbia.

L. & T. No. 210,748.

ALLAN E. WALKER & COMPANY, INC., a Corporation, Plaintiff,

vs.

JOSEPH W. BAILEY, Defendant.

DISTRICT OF COLUMBIA, *ss:*

Leroy Gaddis, Jr., being first duly sworn deposes and says that he is an officer of the plaintiff corporation and has personal knowl-

edge of the facts involved in the above entitled case; that the plaintiff, Allan E. Walker & Co., Inc., a Corporation, is entitled to the possession of the premises known and described as suite of offices, rooms #805 to #811, both inclusive, on the 8th floor in the Southern Building, 15th and H Streets, Northwest, located in the City of Washington, District of Columbia, and that the said premises are unlawfully detained from the plaintiff and held without right by the defendant, Joseph W. Bailey, to whom the plaintiff's assignors had heretofore rented the said premises by a written lease, bearing date of the 21st day of August, 1917, and that the tenancy of the defendant under said lease has been determined by the breach of the defendant of the conditions of said lease.

Complainant prays that a summons be issued, commanding the defendant to appear and show cause why judgment should not be given against him for the restitution of possession of said premises, besides costs of this suit.

LEROY GADDIS, Jr.

ARCHER & SMITH,
GODFREY L. MUNTER,
Attorneys for Plaintiff.

Subscribed and sworn to before me this 16th day of December, 1921.

HELEN D. SYMONS,
Notary Public, D. C.

3 *Finding.*

March 15, 1922.—Come now the parties hereto and thereupon this cause being heard and submitted the Court finds in favor of the plaintiff for possession of rooms #805 *and* #811, both inclusive on the eighth floor in the Southern Building, 15th and H Streets, N. W., located in the District of Columbia.

Judgment.

March 23, 1922.—It appearing under Rule of Court that judgment be entered, it is so ordered. Wherefore, it is considered that plaintiff recover of defendant possession of the suite of offices, rooms #805 to #811, both inclusive, on the eighth floor, in premises, Southern Building, 15th and H Streets, N. W., located in the District of Columbia.

4 *Order Extending Time.*

Filed April 27, 1922.

* * * * * * *

For cause shown, and it appearing that the attorneys for the plaintiffs, the defendants in error, have consented thereto, it is this 27th day of April, A. D., 1922,

Adjudged, ordered and decreed, that the time for filing the Bill of Exceptions in the above entitled cause be extended twenty (20) days beyond the date required under the rules of this Court.

EDW. B. KIMBALL,
Justice.

5 *Memoranda.*

May 16, 1922.—Bill of Exceptions submitted.
July 22, 1922.—Bill of Exceptions signed and filed.
March 31, 1922.—Bond for $1,200, approved and filed.
August 1, 1922.—Bond for $5,000, approved and filed.

6 In the Municipal Court of the District of Columbia.

L. & T. No. 210,748.

ALLAN E. WALKER & CO., INC., a Corporation, Plaintiff,

vs.

JOSEPH W. BAILEY, Defendant.

Bill of Exceptions.

Filed Jul. 22, 1922. Municipal Court, District of Columbia.

Be it remembered that the above entitled cause came on for trial in the Municipal Court of the District of Columbia, before the Honorable Edward B. Kimball, Judge of said Court, on the 15th day of March, 1922, without a jury, Messrs. Archer & Smith and Godfrey L. Munter appearing for the plaintiff, and the defendant Joseph W. Bailey, acting as his own counsel, together with Messrs. Joseph P. Tumulty and Charles H. Baker, and at said trial the following proceedings were had:

1. The plaintiff, in support of its claim for possession of premises known and described as suite 805 to 811, inclusive, in the Southern Building, City of Washington, District of Columbia, produced as the first witness on its behalf one ROBERT F. FREER, who testified that he was at the time of the trial the manager of the Southern Building and an employee of the plaintiff corporation, and was in charge of the files pertaining to said management. Plaintiff thereupon, after due identification and proof, offered in evidence a certain lease between the Southern Realty Corporation, plaintiff's assignor, and the defendant herein, a copy of which lease is hereto attached and prayed to be read and considered as part hereof (Exhibit A). No objection was raised by defendant and said lease was thereupon admitted in evidence. It was further proved that on the 1st day of July, 1921, the Southern Building was conveyed to the plaintiffs herein by the Southern Realty Corporation, and the assignment above referred to was incident to said conveyance.

2. Thereupon plaintiff proceeded with its case and testified by said witness Freer that on or about the 4th day of March, 1921, the defendant, Joseph W. Bailey, lessee under said lease agreement, surrender possession of said premises to Joseph P. Tumulty and his associates, removing from said premises his library and other
7 office furniture and equipment. Plaintiff further testified that at said time, the name of Joseph W. Bailey was removed from all doors leading to said suite of rooms, as well as inside doors, and that in place thereof were substituted the names of Joseph P. Tumulty and his associates. It was further testified that all mail addressed to defendant to said suite of offices is forwarded, pursuant to instructions by defendant, by the U. S. Post Office Department, to Dallas, Texas, whereto defendant removed his law practice.

In concluding its case, plaintiff testified that said Joseph P. Tumulty is now in possession of said premises, using them for general law offices; that plaintiff acquired title to said Southern Building on July 1, 1921, and that incident to said acquisition of title, the said lease by and between the said Southern Realty Corporation and defendant was duly assigned to plaintiff; that no rent has been accepted by plaintiff at any time, either from defendant or said Joseph P. Tumulty. It was further testified that said tenancy of said Joseph P. Tumulty and his associates was at no time recognized by the plaintiff.

3. At this point, the plaintiff rested and the defendant commenced cross-examination by asking the witness Freer whether the plan of selling offices in the Southern Building had been abandoned, to which witness replied "I have had nothing to do with the plan to sell and know nothing about it". The witness then was asked by the defendant if he had ever discussed with Mr. Tumulty or Mr. Charles H. Baker the sale of offices in controversy to them, to which, again the witness replied "I never consulted Mr. Tumulty or his associates about such a plan."

4. The plaintiff thereupon closed its case and the defendant called as its first witness, Charles H. Baker, Esq., who testified that he was associated with Mr. Tumulty in Suite 805 to 811, inclusive, Southern Building, and that they had occupied said suite since about March 4th 1921; that he and Mr. Tumulty were paying to Mr. Bailey for the use and occupancy of the premises, the sum of $200 per month, the amount stipulated in said lease, in the way of rent and that Mr. Bailey reserved the right to return to said suite at any time, it might be convenient for him.

The defendant then asked Mr. Baker if he had ever discussed with any agent or representative of the plaintiff, the purchase of said offices, to which question the plaintiff's counsel objected on
8 the grounds that no time or place of said alleged conversation were fixed and that said representative, if any, was not identified and further that an alleged verbal offer would not constitute any waiver of the breach under the lease, which objection the Court sustained. The defendant then stated to the Court that he tendered the testimony of Mr. Baker to show that while he and Mr. Tumulty were

occupying those offices and had been occupying them for several months, the plaintiff sought them out for the purpose of selling the offices to them and did not at that time claim that the occupancy of the offices was in violation of the contract, the defendant, of course, excepting to prove the time and place of such conversation. To which statement of the defendant the Court replied that such testimony was, nevertheless, immaterial. The defendant then stated that the testimony was material in that it would tend to show that if the premises had been sub-let, that breach of contract had been waived. The defendant further stated that the testimony was not offered on the question of sub-letting, but was offered entirely on the question of waiver.

5. Mr. TUMULTY was then offered as a witness on behalf of the defendant, and he testified that he and his associates occupied the premises in question, paying to Mr. Bailey the sum of $200 per month for the use and occupancy of the premises. Witness further testified that at the time the offices were received by him, Mr. Bailey reserved the right to return and occupy them at any time he desired to resume the practice of law in Washington.

Witness Tumulty further testified that his name had been placed on the directory board on the first floor of the said Southern Building, without his request of suggestion. On cross-examination, he admitted that at the time he took possession of the suite, Mr. Bailey and his associates had their names removed from all the doors leading to and in said suite and that the names of witness Tumulty and those of his associates were placed thereon, said work being done at the expense of the witness.

6. The defendant himself then took the stand on his own behalf and after a lengthy statement concerning his motive in removing his law practice to Dallas, Texas, testified that he had not sub-let the office to Mr. Tumulty, but had allowed him to take possession of them, with the understanding that he should have the right to resume possession of them whenever he saw fit to do so. To this testimony counsel for the plaintiff objected on the grounds that
9 the question of sub-letting was one for the Court to decide being a matter of law, and was the underlying question in the case. This objection, the Court sustained and the defendant noted his exception, and based his exception on the ground that the Court, in order to properly pass upon the question as to whether or not the offices had been sub-let, must know the facts and circumstances surrounding the transaction.

The defendant then testified that on or about July 1, 1921, he gave to the Southern Realty Corporation, plaintiffs' assignor, a draft for $1,250.00, covering rental of said premises for the months of January, February, March, April, May and June of 1921. The sum of $50.00 cash, was returned the defendant at the time of said transaction, the rental amounting to $1,1200. A photostatic copy of said draft, with its endorsements, is hereto attached, marked Exhibit "B", and prayed to be read and considered as part hereof. It is agreed that the books of the Southern Realty Corporation show that

said draft was received on the 9th day of July, 1921, and the stamp on the back thereof shows that it was deposited for collection in the District National Bank of this City, on the same day. To this line of testimony, counsel for plaintiff objected on the grounds that any transaction between the defendant and the Southern Realty Corporation, after the said conveyance and assignment of July 1st, was not binding upon this plaintiff and did not constitute a waiver and was immaterial insofar as the rights of this plaintiff was concerned. This objection, the Court sustained and ruled that this plaintiff was entitled to the benefits of said lease, even though a former assignor accepted rent after the assignment, for period of time previous thereto, and the defendant noted its exception to said ruling, stating that he excepted on the grounds that the plaintiff acquired the building with the full knowledge of the transaction between the defendant and the Southern Realty Corporation, and therefore acquired it subject to all the rights existing between the defendant and the Southern Realty Corporation, at the time of the said conveyance; that the assignees stood in the shoes of the assignor and was therefore bound by any waiver which the Southern Realty Corporation had made expressly, or by its conduct, and that if the Southern Realty Corporation was estopped from setting up a breach, its assignors were also estopped, and further that the assignee of the lessor had no right for breach of covenant or condition broken against lessee when that breach of covenant had occurred or that condition broken previous to the assignment of the same. To this statement of the defendant, the Court replied that the testimony in the case did not constitute a waiver binding as against this plaintiff, the said payment of $1,200 to the said Southern Realty Corporation having been made sometime after conveyance to this plaintiff. The Court again stated that the lessor had a right even if the breach of subletting had been waived to thereafter declare a forfeiture on that same breach. To which ruling counsel for the defendant excepted for the reasons above stated.

Thereupon, the foregoing being the substance of all of the evidence in the case, the same was argued by counsel for the respective parties and submitted to the Court, and the latter announced that he found that the facts established a subletting by the defendant and that the plaintiff was entitled to recover possession of the premises in question.

Thereupon, the defendant in open Court noted its exception to the said findings and rulings of the Court and to the direction that judgment for the plaintiff be entered thereon, and gave notice that application for a writ of error to the Court of Appeals of the District of Columbia would be made, and the penalty on the bond upon said writ of error was thereupon fixed at $5,000.00, with leave to the defendant, if it so desired, to deposit that sum in cash in lieu of bond.

The foregoing exceptions were duly noted by the defendant at the time of the findings and rulings excepted to and were duly allowed by the Court.

Whereupon, the defendant admitting itself to be aggrieved by the

rulings, findings and judgment of the Court in the above entitled cause prays the Court to settle this its bill of exceptions which is accordingly done, now for then, this 22 day of July, 1922.

By the Court:

EDW. B. KIMBALL,
Justice.

ARCHER & SMITH,
GODFREY L. MUNTER,
Attorneys for Plaintiff.
M. M. DOYLE,
Attorney for Defendant.

11 EXHIBIT A.

This lease made by and between the Southern Realty Corporation, owner of the Southern Building, Washington, D. C., of the first part, and Joseph W. Bailey, Washington, D. C., of the second part;

Witnesseth, That the party of the first part hereby leases to the party of the second part the premises known as Rooms 805 to 811 inclusive, on 8th floor in the Southern Building for the term of Five Years commencing on the First day of July 1917 for the sum of ($2,400.) Twenty-four hundred dollars payable in monthly installments of $200.00 in advance, at Southern Building, Washington, D. C., the first payment to be made on the 1st day of July, 1917, and a like sum on the 1st day of each month thereafter. And unless the said premises are vacated and the keys to same are delivered to the party of the first part on the day of the expiration of said term, the party of the second part shall become a tenant by the month at the same rental and under the conditions contained in this Lease, Provided, that at least ten days prior to the expiration of the first year or any subsequent year, the party of the first part has not notified the party of the second part of his desire to have possession of said rooms or to change any of the conditions of this agreement.

And the second party of the second part covenants that he will not sublet the said premises, without the consent in writing of said party of the first part; that he will not use said premises for any unlawful pruposes; that he will pay the said rent as above stated, the party of the first part to furnish heat, light, water and janitor service; that all repairs rendered necessary by the negligence of the party of the second part shall be paid for by him and that he will surrender the same at the expiration of his tenancy in good order, ordinary wear and tear and damage by the elements excepted.

And it is further agreed that if any installment of the rent hereinbefore reserved be not paid at the time agreed upon, although no demand shall have been made for the same, or if any of the covenants herein contained be not performed according to their full tenor and effect, then and in either of said events, the tenancy created by this lease shall forever cease and determine, at the option

of the party of the first part, and the part of the first part may re-enter upon said premises and repossess the same, and avail himself of the remedies provided by law regulating proceedings between landlord and tenant, without notice to the party of the second part, all notice in such case being hereby expressly waived by the party of the second part.

The party of the first part may enter said premises at any reasonable hour to make necessary repairs to protect the same against elements, or to put up or remove awnings from any of the windows.

And it is further agreed that no waiver of one breach of any covenant herein shall be construed to be a waiver of the covenant itself, or of any subsequent breach thereof.

It is understood and agreed that upon the expiration of this lease same may be renewed for a period of two years at the same rental.

In testimony whereof, the said parties have hereunto signed their names and affixed their seals, this 21 day of August, A. D. 1917.

SOUTHERN REALTY CORPORATION,
By G. E. RAUSCH, [SEAL.]
Manager.
JOSEPH W. BAILEY. [SEAL.]

Witnessed by
HELEN D. SYMONS.

For value received we hereby assign all our right, title and interest in this within agreement to Allan E. Walker & Co., Inc.

SOUTHERN REALTY CORPORATION,
By CORNELIUS FORD,
Vice Pres.

Dated 7/1/21.

12 EXHIBIT "B."

Pd. ck. 7/16/21. P. J. G.

$1,250.00 Washington, D. C., July 1st, 1921.

At sight Pay to the Order of Southern Realty Co., Twelve hundred and fifty 0/100 dollars, value received, and charge the same to account of

J. W. BAILEY.

To W. E. Norton,
Wichita Falls, Texas.
No. —.

[Across face:] 7/16/21. [Name illegible.] 12774.

[Endorsed:] For deposit in the District National Bank to the credit of Southern Realty Corporation, by H. D. Symons, Manager. Pay to the order of any bank or banker, American National Bank, Richmond, Va. O. H. Hill, Cashier. Jul. 10, 1921. [Illegible.] 4,852.10.

15 *Designation of Record.*

Filed August 2, 1922.

* * * * * * *

The Clerk is directed by the attorney for the (appellant) defendant herein to prepare the following transcript of record:

1. Complaint.
2. Finding by the Court.
3. Judgment on the finding.
4. Order extending time for submitting Bill of Exceptions.
5. Memorandum of submission of Bill of Exceptions.
6. Memorandum of the signing and filing of Bill of Exceptions.
7. Bill of Exceptions.
8. Assignment of Errors.
9. Memorandum of bond and approval thereof.
10. This designation of record.

M. M. DOYLE,
Attorney for the Defendant.

16 UNITED STATES OF AMERICA,
District of Columbia, ss:

Municipal Court of the District of Columbia.

I, Blanche Neff, Clerk of the Municipal Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to —, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause, Landlord and Tenant, No. 210,748, wherein Allan E. Walker and Company, Inc., a Corporation, is plaintiff, and Joseph W. Bailey, is defendant, as the same that remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 8th day of August, 1922.

[Seal of Municipal Court of the District of Columbia.]

BLANCHE NEFF,
Clerk.

13 *Assignment of Errors.*

Filed August 2, 1922.

* * * * * * *

Counsel for defendant designates the following assignment of error-:

1st. The Court erred in excluding the question addressed to plaintiff's witness, Freer, by the defendant, asking Freer if he had every discussed with Mr. Tumulty or Mr. Baker a proposition to sell the offices in controversy to them.

2nd. The Court erred in holding that if the Southern Realty Corporation accepted rent with the knowledge that Mr. Tumulty and his associates occupied the offices, and thus waived itself against the breach of subletting, such action on the part of the Southern Realty Corporation would not bind its assignee, the plaintiff.

3rd. The Court erred in excluding the question addressed by the defendant to the witness, Mr. Baker, asking the witness, whether he, Baker, had ever discussed with any agent or representative of the plaintiff, the purchase of the offices in controversy.

4th. The Court erred in refusing to allow the defendant to testify to the agreement under which he turned over the said offices to Mr. Tumulty.

5th. The Court erred in refusing to allow the defendant to state the facts and circumstances surrounding the turning over of the said offices to Mr. Tumulty.

6th. The Court erred in holding that no transaction between the Southern Realty Corporation and defendant in connection with the renting of said offices could be binding on the assignee of the Southern Realty Corporation, the plaintiff below.

14 7th. The Court erred in holding that if a condition were broken or covenant breached by this defendant while the Southern Realty Corporation was still his landlord and the Southern Realty Corporation had taken no action on such condition broken or covenant breached, nevertheless, the assignee of that Corporation, the plaintiff below, had a right of action for such condition broken or covenant breached.

8th. The Court erred in construing the following provision of the lease, "No waiver of one breach of any covenant herein shall be construed to be a waiver of the covenant itself, or of any subsequent breach thereof," to mean that even if the Southern Realty Corporation had waived the violation, if there was a violation of the provision against subletting, that under this clause, the assignee of the Southern Realty Corporation, the plaintiff below, would have a right of action against this defendant, under the lease, for the same breach.

M. M. DOYLE,
Counsel for Defendant.

17 Filed Apr. 7, 1922. Municipal Court, District of Columbia.

UNITED STATES OF AMERICA:

The President of the United States to the Honorable Edward B. Kimball, Judge of the Municipal Court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Municipal Court, before you, between Allan E. Walker & Co., Inc., a corporation, Plaintiff, and Joseph W. Bailey, Defendant, L. & T. No. 210,748, a manifest error hath happened, to the great damage of the said Defendant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Court of Appeals of the District of Columbia, together with this writ, so that you have the same in the said Court of Appeals, at Washington, within 20 days from the settling of the bill of exceptions, or within such additional time after the expiration of the 20 days as the court below or a judge thereof for sufficient cause shall allow; that the record and proceedings aforesaid being inspected, the said Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Constantine J. Smyth, Chief Justice of the said Court of Appeals, the 7th day of April, in the year of our Lord one thousand nine hundred and twenty-two.

[Seal of Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by
CHAS. H. ROBB,
Associate Justice of the Court of Appeals of the District of Columbia.

Endorsed on cover: District of Columbia Municipal Court. No. 3856. Joseph W. Bailey, plaintiff in error, vs. Allan E. Walker and Company, Inc., a corporation. Court of Appeals, District of Columbia. Filed Aug. 3, 1922. Henry W. Hodges, clerk.